

Disclaimer: This is a preliminary working draft of a Water Rights Compact that could be part of a comprehensive water rights settlement among the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States. As with any negotiation of a complex settlement of litigation and other issues, nothing in this document is agreed to until everything is agreed to by the three parties. When it is ultimately completed, this Compact is intended to be accompanied by an Ordinance (a draft of which has already been released to the public and which itself needs substantial further work and revision), and a package of changes to State law which collectively will lay out the Tribes' water rights, and how all water is to be administered within the boundaries of the Flathead Indian Reservation. The draft is structured under the general format of other Montana Water Rights Compacts. It cannot be emphasized strongly enough that the following draft is merely an initial effort at identifying as many as possible of the issues that need to be addressed in the settlement negotiations, and suggesting some approaches for dealing with at least some of them. It is best viewed as the early stage of a work in progress.

**WATER RIGHTS COMPACT
ENTERED INTO BY
THE CONFEDERATED SALISH & KOOTENAI TRIBES,
THE STATE OF MONTANA, AND
UNITED STATES OF AMERICA**

This Compact is entered into by and among the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States of America to settle all existing claims to water of or on behalf of the Confederated Salish & Kootenai Tribes within the State of Montana.

ARTICLE I – RECITALS

WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation; and

WHEREAS, pursuant to said Treaty, the Confederated Salish & Kootenai Tribes claims reserved [and aboriginal] water rights to fulfill the purposes of the Treaty and the Reservation; and

WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Confederated Salish & Kootenai Tribes, their members and Allottees brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribes' water rights claims, see United States v. Abell, No. CIV-79-33-M (filed April 5, 1979); and

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WHEREAS, Congress consented to state court jurisdiction over the quantification of claims to water rights held by the United States of America in trust for Indian tribes; see “the McCarran Amendment,” 43 U.S.C. 666(a)(1) (1952); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); [CSKT may prepare an alternative] and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes claims regarding the Confederated Salish & Kootenai Tribes’ Tribal water rights; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes and/or on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the Federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see Northern Cheyenne v. Adsit, 721 F.2d 1187 (9th Cir.,1983); and

WHEREAS, the adjudication of Confederated Salish & Kootenai Tribes’ Tribal water rights in the State court proceeding has been stayed while negotiations are proceeding to conclude a compact resolving all water rights claims of the Confederated Salish & Kootenai Tribes; and

WHEREAS, the Confederated Salish & Kootenai Tribes, or their duly designated representatives, have authority to negotiate the Compact pursuant to Article 6, Section 1, subsections (a), (c), and (u) of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended; and

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute the Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. sections 516-17; and

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute the Compact on behalf of the United States Department of the Interior pursuant to 43 U.S.C. 1457, inter alia; and

WHEREAS, the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States agree that the Tribal Water Right described in the Compact is in satisfaction of the

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water rights claims of the Tribes, their members and Allottees, and of the United States on behalf of the Tribes and their members and Allottees [CSKT may prepare additional language]; and

WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the Confederated Salish & Kootenai Tribes be settled through agreement between and among the Tribes, the State of Montana, and the United States;

NOW THEREFORE, the Parties agree to enter into the Compact for the purpose of settling the water rights claims of the Confederated Salish & Kootenai Tribes, their members, and Allottees of the Flathead Indian Reservation and of the United States on behalf of the Tribes, their members and Allottees.

ARTICLE II- DEFINITIONS [This section is under development]

The following definitions shall apply for purposes of the Compact:

1. “Acre-foot” or “Acre-feet” or “AF” means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.
2. “Acre-Feet per Year” or “AFY” means an annual quantity of water measured in acre-feet over a period of a calendar year.
3. “Allottee” or “Allottees” means any individual or individuals who own or hold a trust allotment or interest in a trust allotment on the Reservation under the authority of the General Allotment Act (24 Stat. 388) and the Flathead Allotment Act (33 Stat. 302), and subject to the terms and conditions of those Acts.
4. “Annual” means during one calendar year.
5. “Arising Under State Law” means, as applied to a water right, a water right created under Montana law and does not include water rights Arising Under Federal Law.
6. “Arising Under Federal Law” means, as applied to a water right, a water right created or defined under Federal law.
7. “Basin 76L” means the hydrologic Basin 76L, including the Flathead River and its tributaries, as shown in Appendix ____.
8. “Basin 76LJ” means the hydrologic Basin 76LJ, including ____ and its tributaries, as shown in Appendix ____.

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9. “Call” means the right of the holder of a water right with a senior priority and an immediate need for a recognized use to require a holder of a water right with a junior priority to refrain from diverting water otherwise physically available.
10. “Cfs” means cubic feet per second.
11. “Compact” means this water rights settlement entered into by the Confederated Salish & Kootenai Tribes, the State and the United States.
12. “Consumptive Use” means...
13. “Current Streamflows” means the streamflows, with their seasonal and interannual variability, which are currently observed on Reservation streams and which are protected as part of the Tribal Water Right set forth in Article III.C.1.b.
14. “DNRC” means the Montana Department of Natural Resources and Conservation, or any successor agency.
15. “Effective Date” means the date on which the Compact is finally approved by the Tribes, by the Montana legislature and by the Congress of the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest.
16. “Excepted Rights” means [to be developed]
17. “Existing Use” means a use of water under color of Tribal, State or Federal law in existence as of the date the ratification of the Compact by the Montana legislature takes effect under State law, provided that any portion of a Water Right Arising Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the Montana legislature takes effect under State law, voluntarily relinquished or is determined under State law to be abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing Use pursuant to the Compact.¹
18. “Flathead Indian Irrigation Project” or “Project” means the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156,

¹ *This definition may need to be modified to make specific provision for post-1996 wells, as their current legal status is murky at best and they thus may not fall under this definition even though the intent of the parties is to create a process to allow them to be recognized as legally valid in some form.*

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35 Stat. 441 (1908), and includes, but is not limited to, all lands, reservoirs, whether situated on or off the Reservation, easements, rights-of-way, canals, ditches, laterals, or any other Project facilities, headgates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the Project.

19. “Flathead Indian Irrigation Project Cooperative Management Entity” or “CME” means the formed pursuant to the laws of the State by the Tribes and the Flathead Joint Board of Control as the Flathead Indian Irrigation Project Cooperative Management Entity pursuant to an agreement signed on March 15, 2010 [*authority – DOI K and State-Tribal Co-op Agreement*], and which is authorized by the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), to assume management and operation of the Project.

20. “Flathead Joint Board of Control” or “FJBC” means...

21. “Flathead Reservation Water Administration Board” or “Board” means the administrative entity created by the Compact pursuant to Tribal and State [*and Federal?*] law to administer and enforce the use of all water rights on the Reservation.

22. “Ground Water” means any water that is beneath the ground surface.

23. “Harm” means an adverse effect on a water right.

24. “Hungry Horse Reservoir” means ...

25. “Law of Administration” means the materially consistent body of laws enacted by both the State legislature and the Tribal Council to provide for the administration of surface and ground water within the Reservation, [as well as those waters that appertain to the operation and maintenance of the Project that are diverted and transported onto the Reservation for Project purposes].

26. “Natural Flow” means the water that would exist in a watercourse absent human intervention.

27. “New Development” means the development of a use of the Tribal Water Right set forth in the Compact, from any source, commencing after the date of the ratification of the Compact by the Montana legislature takes effect under State law, and encompasses all uses of the Tribal Water Right not defined as Existing Uses.

28. “Non-irrigation Use” means the use of a water right for purposes other than irrigation.

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29. “Parties” means the Tribes, the State, and the United States.
30. “Person” means an individual or any other entity, public or private, including the Tribes, the State, and the United States, and all officers, agents and departments of each of the above.
31. “Registered Use” means a use of the Tribal Water Right in existence as of the date of the ratification of the Compact by the Montana legislature takes effect under State law and identified on the Registration of Current Uses compiled by the Tribes and the United States and approved by the DNRC pursuant to Article IV.B.3.
32. “Reservation” means ...
33. “Secretary” means the Secretary of the United States Department of the Interior, or the Secretary’s duly authorized representative.
34. “State” means the State of Montana and all officers, agencies, departments and political subdivisions thereof.
35. “Stock Water” means water used for livestock.
36. “Supplemental Water” means [to be developed]
37. “Lease” means, as applied to the Tribal Water Right, to authorize a Person or Persons to use any part of the Tribal Water Right through a service contract, temporary assignment, or other similar agreement of limited duration.
38. “Tribal Council” means the governing body of the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation.
39. “Tribal Natural Resources Department” or “TNRD” means the governmental subdivision of the Tribes authorized by Tribal Ordinance No. 78-B, as amended, or any successor agency.
40. “Tribal Water Right” means the water rights of the Confederated Salish & Kootenai Tribes, including any Tribal member or Allottee described in Article III of the Compact.
41. “Tribes” means the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, and all officers, agencies, and departments thereof.
42. “United States” means the Federal government and all officers, agencies and departments thereof.

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43. “Water Rights Arising Under State Law” means those valid water rights Arising Under State Law existing as of the date of the ratification of the Compact by the Montana legislature under State law and not subsequently relinquished or abandoned, as those rights are: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by DNRC; exempted from filing in the State adjudication pursuant to 85-2-222, MCA; or excepted from the permitting process pursuant to 85-2-306, MCA.

ARTICLE III – TRIBAL WATER RIGHT

[To be developed]

ARTICLE IV – IMPLEMENTATION OF COMPACT

[The parties are still discussing the provisions that would be addressed in the Compact versus the issues that will be addressed in the Law of Administration]

A. Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribes, their members and Allottees.

B. Use of Tribal Water Right.

1. Persons Entitled to Use Tribal Water Right. The Tribal Water Right may be used by the Tribes, and/or Persons authorized by the Tribes.

1. Effect of Non-Use of the Tribal Water Right. Non-use of all or any portion of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such right.

2. Registration of Current Uses of the Tribal Water Right.

Montana Alternative: Within one (1) year after the date of the ratification of the Compact by the Montana legislature under State law, the TNRD and the United States shall provide the DNRC with a report, in a form materially consistent with that of abstracts of water rights decreed by the Montana Water Court, listing all current uses of the Tribal Water Right, including uses by Tribal members, existing as of the date of the ratification of the Compact by the Montana legislature under State law. The DNRC may request additional information from the TNRD or the United States to assist in reviewing the report. Within six (6) months after receipt of the report, the DNRC must agree or disagree with the listing of all current uses of the Tribal Water Right. If the DNRC disagrees with the report, representatives of the DNRC, the TNRD and the United States must meet and confer within thirty (30) days of issuance

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of the DNRC's notice of disagreement in an effort to resolve the issue(s) giving rise to the disagreement. If, after meeting and conferring, the Parties are still unable to come to agreement on the list of current uses [*need a dispute resolution process*].

CSKT Alternative: Within three (3) years after the Effective Date of this Compact, the TNRD and United States shall provide the DNRC with a report, in a form materially consistent with that of abstracts of water rights decreed by the Montana Water Court, listing all uses of the Tribal Water Right existing as of the effective date of the compact. Within six (6) months after receipt of the report, the DNRC must agree, agree in part, or disagree with the report. If the DNRC takes no action by the end of the six month period after the report is received, the report shall be deemed accepted. If the DNRC agrees in part or disagrees with the report, the parties shall meet within ninety (90) days of issuance of the DNRC's notice of disagreement in an effort to resolve the issue(s) giving rise to the disagreement. If, after meeting and conferring, the Parties are still unable to come to agreement on the list of existing uses the disagreement will be referred to the Water Management Board for resolution of the dispute.

3. Change in Uses of the Tribal Water Right.

Any user of a portion of the Tribal Water Right who proposes to change such use must seek authorization to change the use of that right. Such applications for authorizations to change use shall be heard and decided by the Board pursuant to Article IV.C.4.b of the Compact and the Law of Administration: provided that the Board may not consider any change application unless the applicant has secured the prior approval of the Tribal Council.

4. Development of Future Uses of the Tribal Water Right. [This section to be developed]

5. Lease of the Tribal Water Right. [This section to be developed]

C. Administration: Establishment of Flathead Reservation Water Administration Board. [This section to be developed]

1. Establishment of Board.

2. Membership.

3. Quorum and Vote Required.

4. Jurisdiction of the Board.

5. Powers and Duties.

6. [Review and Enforcement of Board Decisions.

7. Waiver of Immunity

D. Distribution of Water in Times of Shortage. This section to be developed.

E. Information Sharing.

1. Within one year after a hydrologic basin subject to the Compact is finally decreed by the Montana Water Court, the DNRC shall provide the Board, the TNRD and the United States with a report listing all decreed Water Rights Arising Under State Law within that hydrologic basin.

2. Within one year after the date of the ratification of the Compact by the Montana legislature under State law, the DNRC shall provide the TNRD and the United States with a report listing all uses pursuant to permits and water reservations, and those uses excepted from the permitting requirements of State law to the extent that the DNRC has such information. The DNRC shall provide this same report to the Board as soon as practicable.

3. **Montana Alternative:** Pursuant to Article IV.B.3, within one year after the date of the ratification of the Compact by the Montana legislature under State law, the TNRD and the United States shall provide the Board and the DNRC with a report listing all Existing Uses of the Tribal Water Right, provided that, due to the small and varied nature of the traditional religious and cultural uses identified in Article III.A, such uses need not be included on the report required by this subsection.

CSKT Alternative: Pursuant to Article IV.B.3, within three years after the Effective Date, the TNRD and the United States shall provide the Board and the DNRC with a

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report listing all Existing Uses of the Tribal Water Right, provided that, due to the small and varied nature of the traditional religious and cultural uses identified in Article III.A, such uses need not be included on the report required by this subsection.

4. On a regular basis and no less frequently than once a year, the Board shall provide the Tribes, the United States and the DNRC with a listing of all New Uses for which a certificate of water right or permit has been issued or a Change in Use has been approved by the Board within the Reservation, and an ownership update for each water right within the Reservation whose owner of record has been changed in the Board's database.

5. The TNRD, the DNRC, and the United States may agree to modify the reporting requirements set forth in Article IV.E. Such modification is pursuant to, and shall not be deemed a modification of, the Compact.

6. Any Party or the Board may request additional information from any other Party or the Board to assist in reviewing any report made by one Party to another.

F. Notice and Reporting. All notices and reports required by the Compact to be delivered to or served on a Party or the Board shall be sent to:

1. The Chair of the Tribal Council, Pablo, Montana;
2. The Director of DNRC, Helena, Montana; and
3. The Regional Director of the Bureau of Indian Affairs;
4. *Board address to be supplied*

ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

[This section under development]

ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

A. State Contribution to Settlement. *[TBD]*

B. Federal Contribution to Settlement. The Parties agree that the Federal contribution to settlement shall be negotiated by the Tribes, the State, and the United States as part of the negotiations on the Federal legislation.

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C. Federal Legislation. The Tribes and the State agree to seek ratification of the Compact by Congress and any additional Federal legislation necessary to effectuate the Compact.

ARTICLE VII – FINALITY

A. Ratification and Effectiveness of Compact.

1. The terms of the Compact may not be modified without the consent of all the Parties following the first ratification by any Party.
2. Notwithstanding any other provision in the Compact, the Tribes reserve the right to withdraw as a Party if: [to be developed]
3. The Tribes may exercise their right to withdraw from the Compact under Article VII.A.2 by sending to the Governor of the State and to the Secretary of the Interior by certified mail a resolution of the Tribal Council expressing the Tribes' intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.
4. Notwithstanding any other provision in the Compact, the State reserves the right to withdraw as a Party to the Compact if: [to be developed]
5. The State may exercise its right to withdraw by sending to the Chair of the Tribal Council and to the Secretary of the Interior a letter delivered by certified mail from the Governor of the State expressing the State's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the letter. On the date designated in the letter for State withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.

B. Incorporation into Decrees.

1. Within one hundred eighty (180) days of the date the Compact is ratified by the Tribes, the State, and Congress, whichever is latest, the Tribes, the State, and/or the United States shall file, in the general stream adjudication initiated by the State, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed

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decree set forth in Appendix __ as the decree of the water rights held by the United States in trust for the Tribes and the Allottees of the Tribes. If the State Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribes. If the State Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the State Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribes. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The Parties understand and agree that the submission of the Compact to a State court or courts, as provided for in the Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the State court or expand in any manner the waiver of sovereign immunity of either the United States or the Tribes in the McCarran Amendment, 43 U.S.C. 666, or other provision of Federal law.

2. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the State Water Court shall be limited to Article III, and Appendix __ [*proposed decree*], and may extend to other sections of the Compact only to the extent that they relate to the determination of existing water rights. The final decree shall consist of Article III and such other provisions of the Compact as are related to the determination of existing water rights as displayed in Appendix __, and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

C. Disposition of State and Federal Suits.

1. On issuance of a final decree by the State Water Court or its successor, and the completion of any direct appeals therefrom, or on expiration of the time for filing any such appeal, the United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed.R.Civ.P., to dismiss without prejudice any and all claims of the Tribes, Tribal members, and Allottees and any and all claims made by the United States for benefit of the Tribes, Tribal members, and Allottees in United States v. Abell, No. CIV-79-33-M (filed April 5, 1979). The case may only be resumed if the State or Tribes exercise their rights under Article VII.A.
2. The Decree shall be filed by the Parties as a consent decree in Abell, or in Federal court as a new proceeding after the dismissal of Abell, conditional on agreement by the Parties to seek the necessary State, Tribal, and Federal legislation to implement the remaining provisions of the Compact, if it is finally determined in a judgment

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binding on the State that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate some or all of the water rights asserted in Abell.

3. [Need to develop language regarding Ciotti IV (Axe) case]

D. Settlement of Tribal Water Right Claims. [This Section is being developed]

E. Settlement of Tribal Claims Against the United States. Waiver of claims against the United States by the Tribes, their members and Allottees shall be as provided by Congress.

F. Binding Effect. After the Effective Date of the Compact and entry of a final decree, its terms shall be binding on:

1. The State and any Person using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State; provided that, the validity of consent, ratification, or authorization by the State is to be determined by State law;
2. The Tribes and any Person using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribes or their members, or any rights arising under Tribal law; provided that, the validity of consent, ratification or authorization by the Tribes is to be determined by Tribal and, if applicable, Federal law; and
3. The United States and any Person using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State; provided that, the validity of consent, ratification or authorization by the United States is to be determined by Federal law.

ARTICLE VIII – LEGISLATION/DEFENSE OF COMPACT

A. State Legislation. The State and the Tribes agree to seek ratification of the Compact by the Montana legislature and any additional State legislation necessary to effectuate the Compact.

B. Federal Legislation. The State and the Tribes agree to seek ratification of the Compact by Congress and any additional Federal legislation necessary to effectuate the Compact.

C. Tribal Legislation. The State and the Tribes agree to seek ratification of the Compact by the Tribes and any Tribal legislation necessary to effectuate the Compact.

D. Defense of the Compact. The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C, and agree that no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties.

IN WITNESS WHEREOF the representatives of the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States, have signed the Compact on the ____ day of ____, 201__.